LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
MAY 27 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

No. ~~1028~~ 69

OCTOBER TERM, 1958

LENORE RUSH,
Petitioner,

vs.

THE CITY OF MAPLE HEIGHTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

JOHN R. VINTILLA,
1104 Hanna Bldg.,
Cleveland 15, Ohio,
Attorney for Petitioner.

OWEN CALVIN NEFF,
Of Counsel.

TABLE OF CONTENTS.

Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement	3
Reasons for Granting the Writ	4
Conclusion	8
APPENDIX:	
Opinion of the Supreme Court of Ohio	9
Order of the Supreme Court of Ohio Denying Application for Rehearing	30

TABLE OF AUTHORITIES.

Cases.

Bensinger v. Davidson, 147 Federal Supplement 492	8
Brunsden v. Humphrey, L. R. 14 Q. B. 141	4
Creighton v. Pope County, 320 Illinois Appeals 256	8
Forbes Pioneer Boat Line v. Board of Commissioner, etc., 258 United States 338	7
Franklin v. Wills, 217 Federal 2nd 899	8
Hutton v. Autoridad Sobre Hogares De La Capital, District Court, Puerto Rico, 1948, 78 Federal Supplement 988	7
Mansker v. Dealers Transportation Co., 160 Ohio St. 255	3, 6
Norwood v. McDonald, 142 Ohio St. 299	3, 6
Prichard v. Norton, 106 United States 124	7

Reilly v. Sicilian Asphalt Paving Co., 170 New York 40; 62 N. E. 772 ..... 4, 5

Vasu v. Kohler, 145 Ohio St. 321 ..... 3, 4, 5, 6

Wills v. Franklin, 131 Federal Supplement 668, Affirmed 8

Texts.

Austin: Jurisprudence, 5th Ed., 307 ff. 5

Holland: Jurisprudence, 11 Ed., 132-140 5

Markley: Elements of Law, 6th Ed., Secs. 161, 167 5

Phillips on Code Pleading, 2nd Ed. 194, Section 211 5

Pound: Readings in the Common Law 420 5

Solmond: Jurisprudence, 3rd Ed., 190 5

Constitution.

Constitution of the United States, Amendment XIV 2

Statute.

28 U. S. C. 1257(3) 2, 4, 8

In the Supreme Court of the United States

No.

OCTOBER TERM, 1957.

LENORE RUSH,

Petitioner,

vs.

THE CITY OF MAPLE HEIGHTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Lenore Rush, respectfully petitions this Honorable Court for a writ of certiorari to review an order and judgment of the Supreme Court of Ohio rendered in this cause on the 26th day of February, 1958.

OPINION BELOW.

The Supreme Court of Ohio reversed the Court of Appeals in and for the Eighth Judicial District of Ohio, Cuyahoga County, and the Court of Common Pleas in and for Cuyahoga County, Ohio, expressly reversing prior decisions of the Supreme Court of Ohio. The Opinion is reported in 167 Ohio St. 221 and attached hereto as Appendix "A." There were no opinions in the Court of Appeals or the Trial Court.

JURISDICTION.

The Supreme Court of Ohio rendered its opinion reversing the Court of Appeals and the Court of Common Pleas on the 29th day of January, 1958. Thereupon and within the time allowed by rule of the Supreme Court of Ohio, the petitioner presented her application for rehearing putting in issue a denial of procedural due process under the XIV Amendment to the Constitution of the United States of America. The application was denied on the 26th day of February, 1958. The order is attached and marked Appendix "B." Jurisdiction is conferred upon the Supreme Court of the United States by Title 28, Section 1257 (3) of the United States Code.

QUESTIONS PRESENTED.

1. When the decisional law as announced by the Supreme Court of a State clearly recognizes a separate and distinct cause of action and the position of that Court is subsequently followed and approved on at least three separate occasions, is that Court at liberty, without notice or warning, to expressly reverse itself so as to deny a cause of action, once vested and upon which the petitioner relied?

2. If as above set forth, is such a reversal a denial of procedural due process and, therefore, void as to the petitioner?

CONSTITUTIONAL PROVISION INVOLVED.

United States Code Annotated, Constitution, Part 3, page 2, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT.

This appeal presents an interesting and challenging set of facts. The statement of the case is extremely simple. The petitioner, Lenore Rush, was injured due to the alleged negligence of the respondent, The City of Maple Heights. As a result of the same accident her vehicle was likewise damaged. Relying upon the prior pronouncements of the Supreme Court of Ohio in *Norwood v. McDonald*, 142 Ohio St. 299, especially *Vasu v. Kohler*, 145 Ohio St. 321, and the subsequent case of *Mansker v. Dealers Transportation Co.*, 160 Ohio St. 255, as well as others in Ohio, she filed her petition in the Court of Common Pleas for personal injury and in the Municipal Court of Cleveland for property damage. The latter case was called for trial and went to judgment in her favor. The respondent appealed all the way to the Supreme Court of Ohio. Affirmed.

Thereupon, the petitioner filed her amended petition in the Court of Common Pleas setting up the judgment in the Municipal Court action showing an adjudication on the issue of liability. Thereafter, at the pre-trial conference, the petitioner moved for and obtained an order determining the issue of liability in her favor. The cause was ordered to trial on the issue of damages alone, all on the authority of *Vasu v. Kohler*, 145 Ohio St. 321, and kindred cases. The cause proceeded to trial. The petitioner presented her medical evidence. The respondent presented none. A judgment was rendered.

The respondent then prosecuted its appeal to the Court of Appeal for the Eighth Judicial District of Ohio wherein the judgment of the Court of Common Pleas was affirmed, all the judges concurring. Upon appeal to the Supreme Court of Ohio, a majority of that Court reversed, Zimmerman, J., dissenting. The Supreme Court of Ohio expressly reversed its pronouncement in *Vasu v. Kohler*, 145 Ohio St. 321, and held that where, out of the same operative facts, a plaintiff sustains injury to his person and damage to his property, he has but one cause of action, not two, and that the two must be joined in the same petition as separate counts. We do not contend that the highest appellate Court in a state jurisdiction, once having announced a rule, cannot thereafter depart therefrom. We do contend, however, that while the rule is in effect it engenders vested rights in a litigant who having relied thereon, holds a substantive right, the rejection of which is a denial of procedural due process.

REASONS FOR GRANTING THE WRIT.

1. The decision in the Supreme Court of Ohio is a denial of procedural due process and violative of the XIV Amendment to the Constitution of the United States of America.

The storm center of this controversy has raged since 1884 when the Court of Appeals in England decided *Brunsden v. Humphrey*, L. R. 14 Q. B. 141. That Court had the identical factual position presented to it and announced that two causes of action prevailed, one for personal injury and one for property damage, maintainable in separate courts, but with a common issue of liability.

The same question was subsequently put to the Court of Appeals of New York in *Reilly v. Sicilian Asphalt Paving Co.*, 170 New York 40; 62 N. E. 772, decided in 1902.

On a set of facts identical to the instant case, the New York Court announced the two cause of action rule in this Country. This opinion is exhaustive and sets forth adequately the reasons for the rule.

Certainly the enlightened view of the profession is to the same effect. *Phillips on Code Pleading*, 2nd Ed. 194, Section 211, says that the cases that adopt a contrary rule, namely the single cause of action are "wrong in principle" and that "these courts have lost sight of the constituent elements of a right of action and of the reasons for stating causes of action separately." All the authors are to the same effect. See:

HOLLAND: *Jurisprudence*, 11 Ed., 132-140;
SOLMOND: *Jurisprudence*, 3rd Ed., 190;
POUND: *Readings in the Common Law* 420;
MARKLEY: *Elements of Law*, 6th Ed., Secs. 161, 167;
AUSTIN: *Jurisprudence*, 5th Ed., 307 ff.

The stage was thus set for the decision in *Vasu v. Kohler*, 145 Ohio St. 321. Judge Hart, writing for the full Court and relying heavily on *Reilley v. Sicilian Asphalt Paving Co.*, 170 New York 40, held that two separate causes of action prevailed.

In Ohio the syllabus is the law of the case. The pertinent syllabi of *Vasu v. Kohler* is as follows:

> "3. A cause of action based upon negligence arises where there exists such an aggregation of investive and operative facts as, under the substantive law, clothes the plaintiff with a specific primary right and the defendant with a corresponding duty as to such right, and a delict or wrong on the part of the defendant violating the duty and interfering with the right which results in consequential damages to the plaintiff."

"4. Injuries to both person and property suffered by the same person as a result of the same wrongful act are *infringements of different rights and give rise to distinct causes of action*, with the result that the recovery or denial of recovery of compensation for damages to the property is no bar to an action subsequently prosecuted for the personal injury, unless by an adverse judgment in the first action issues are determined against the plaintiff which operate as an estoppel against him in the second action." (Emphasis supplied.)

The import of Judge Hart's legal reasoning is set forth at page 331 of the opinion:

"A critical and analytical study of the two-cause-of-action rule will demonstrate that it is in harmony and keeping with the historical and logical development of the common law on that subject, and that it has not been interfered with by the provisions of the codes of civil procedure. The distinctions involved are most important because they involve not only the determination of what constitutes causes of action but the necessary relation of such causes of action to the doctrine of res judicata."

The *Vasu* case was followed by *Mansker vs. Dealers Transportation Co.*, 160 Ohio State 255, wherein the *Vasu* case was expressly affirmed. It should be observed that even before *Vasu*, the Supreme Court of Ohio, Judge Hart again speaking for a full Court in *Norwood v. McDonald*, 142 Ohio St. 299, had adopted the two cause of action rule.

Having established that by the law of Ohio at the time of trial and up until the express reversal in the instant opinion, the petitioner had two causes of action and could prosecute them in separate courts, it remains only to be established that the denial of the same was the in-

vasion of a vested right and obnoxious to the constitutional guarantee.

A cause of action is property and the invasion of a property right once vested is a denial of due process. The cases are legion to the effect that a cause of action once established cannot be removed by the arbitrary action of the legislature. If the legislature cannot invade the right, *a fortiori*, a Court cannot.

> *Hutton v. Autoridad Sobre Hogares De La Capital*, District Court, Puerto Rico, 1948, 78 Federal Supplement 988.
>
> "A vested right of action is property in the same sense in which tangible things are property and are equally protected against arbitrary interference and whether it springs from contract or from principles of the common law, the legislature may not take it away."

To the same effect is *Prichard v. Norton*, 106 United States 124 (1882). At page 132:

> "Hence it is that a vested right of action is property in the sense in which tangible things are property and is equally protected against arbitrary interference. Whether it springs from contract or from the principles of the common law, it is not competent for a legislature to take it away."

In *Forbes Pioneer Boat Line v. Board of Commissioner, etc.*, 258 United States 338, Justice Holmes said a retroactive toll cannot be assessed merely "because the legislature forgot." In the instant case, the petitioner cannot be deprived merely because the Court made a mistake in a prior decision. We contend that once having acted in reliance on the rule, the right became vested. As of the date of the instant decision a litigant proceeds with notice of the single cause of action rule, but the petitioner had no notice.

Other cases holding causes of action are vested rights are *Creighton v. Pope County*, 320 Illinois Appeals 256 (1943); *Bensinger v. Davidson*, 147 Federal Supplement 492; *Wills v. Franklin*, 131 Federal Supplement 668, Affirmed; *Franklin v. Wills*, 217 Federal 2nd 899.

CONCLUSION.

We conclude that a cause of action was vested in the petitioner. That the petitioner relied on the decision of the Supreme Court of Ohio that vested that right and that having so relied a substantive right was created; that by its express reversal in the instant case without notice a substantive right was denied; that this Court should order certiorari to protect the rights of the petitioner guaranteed by the XIV Amendment to the Constitution of the United States.

Respectfully submitted,

JOHN R. VINTILLA,
1104 Hanna Building,
Cleveland 15, Ohio,
Attorney for Petitioner.

OWEN C. NEFF,
Of Counsel.

APPENDIX.

OPINION OF THE SUPREME COURT OF OHIO.

RUSH, APPELLEE, *v.* CITY OF MAPLE HEIGHTS, APPELLANT.

Actions—Personal injuries and property damage resulting from same wrongful act—Only single cause of action arises—Separate items of damage from same act—Pleading—Splitting cause of action—Res judicata—Charge to jury.

Where a person suffers both personal injuries and property damage as a result of the same wrongful act, only a single cause of action arises, the different injuries occasioned thereby being separate items of damage from such act. (Paragraph four of the syllabus in the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, overruled.)

(No. 35170—Decided January 29, 1958.)

APPEAL from the Court of Appeals for Cuyahoga County.

This cause was commenced in the Court of Common Pleas of Cuyahoga County as an action to recover damages for personal injuries resulting from a fall while plaintiff, appellee herein, was riding on a motorcycle over a street in defendant city of Maple Heights, appellant herein.

In her second amended petition, plaintiff alleges that on or about September 20, 1951, she was a passenger on a motorcycle operated by her husband and proceeding in an easterly direction on Schreiber Road within the limits of Maple Heights at a speed of not more than 20 miles per hour, when she was thrown to the ground and injured.

She alleges further that the defendant was negligent in failing to keep Schreiber Road in good repair and free from nuisance, in suffering large holes, "bumps" and "dips" to exist in the regularly traveled portion of the

street, and in failing to erect warning signs giving notice of the unsafe and dangerous condition of Schreiber Road; that the city had notice; and that her injuries were caused directly and proximately by the negligence of the defendant city.

She then alleges:

"Thereafter the plaintiff herein, Lenore Rush, duly filed an action for damage to personal property in the Municipal Court of Cleveland, Ohio, being cause number A 241 307 on the docket of said court, against the defendant herein, the city of Maple Heights. The cause proceeded to trial on or about the 23rd day of March 1954, the Municipal Court of Cleveland rendered its judgment in favor of the plaintiff therein, Lenore Rush and against the defendant therein, the city of Maple Heights. Thereafter upon the motion of the defendant, the city of Maple Heights the Municipal Court of Cleveland rendered its findings of fact and conclusions of law as follows:

"The court finds that the city of Maple Heights had actual notice of the condition of Schreiber Road.

"That the city was negligent in not repairing the hole complained of in plaintiff's petition.

"That such negligence on the part of the city was the proximate cause of the damages sustained by plaintiff in the amount of $100.

"Conclusions of law.

"Judgment for plaintiff in the amount of $100.

"Thereafter on April 19, 1954, the Municipal Court of Cleveland duly overruled the motion of the defendant the city of Maple Heights for a new trial, whereupon the defendant therein filed its notice of appeal to the Court of Appeals in and for Cuyahoga County, Ohio. After the filing of briefs therein and oral argument thereto, the Court of Appeals on or about the

17th day of December 1954 affirmed the judgment of the Municipal Court of Cleveland in favor of the plaintiff, Lenore Rush and against the defendant therein, the city of Maple Heights and directed that a special mandate issue to the Municipal Court of Cleveland in order to carry the judgment into execution.

"Thereafter the defendant therein, the city of Maple Heights filed its motion to certify the proceedings to the Supreme Court of Ohio. After the filing of briefs therein and oral argument thereto, the Supreme Court of Ohio on or about the 21st day of February 1955 denied the motion to certify and affirmed the judgment of the Court of Appeals and the Municipal Court of Cleveland in favor of the plaintiff, Lenore Rush and against the defendant the city of Maple Heights.

"* * *

"The plaintiff in cause number A 241 307 in the Municipal Court of Cleveland is the same Lenore Rush who is plaintiff herein; the defendant in cause number A 241 307 in the Municipal Court of Cleveland is the same city of Maple Heights, defendant herein. The allegations of negligence in cause number A 241 307 in the Municipal Court of Cleveland are the same as the allegations of negligence hereinbefore set forth. The issue of negligence is therefore *res judicata* between the parties hereto."

Plaintiff then filed a motion for an order setting the cause for trial "on the issue of damages alone for the reason that the liability of the defendant has been determined heretofore by the Supreme Court in case number A 241 307 on the docket of the Municipal Court of Cleveland."

In its answer, defendant denies plaintiff's allegations charging it with negligence.

Relative to the effect of the previous action between the parties in the Cleveland Municipal Court, the defendant answers as follows:

> "* * * defendant admits the filing of a lawsuit by plaintiff against defendant in Cleveland Municipal Court and that plaintiff obtained judgment therein, but this defendant denies that said Cleveland Municipal Court judgment is controlling herein.
>
> "Defendant further denies for want of knowledge that the damage sued for in the Cleveland Municipal Court case and the injuries sued for herein allegedly arise out of the same incident, *i.e.*, a fall from a motorcycle striking a hole in the street."

Defendant's answer admits further that it appealed from the judgment of the Municipal Court to the Court of Appeals and to the Supreme Court as alleged by plaintiff and denies for want of knowledge that plaintiff was injured at the time and place or in the manner and to the extent described in plaintiff's petition.

After a pretrial conference, the motion of plaintiff for an order setting this cause for trial on the issue of damages only was sustained, and the case was assigned for trial. A jury was empanelled, and the case submitted.

The court charged the jury that it was not to be "concerned with the issues of defendant's negligence, proximate cause or plaintiff's contributory negligence," because those issues were resolved favorably to the plaintiff and against the defendant in another action between the same parties in the Cleveland Municipal Court, and that the action in that court did not involve a claim for bodily injury, and under the law plaintiff had the right to bring her separate action for personal injuries in the Court of Common Pleas.

The court charged that, as a matter of law, if the plaintiff was involved in this accident on September 20, 1951, and suffered injuries as the proximate result thereof, the defendant would be legally responsible to the plaintiff for whatever injuries she sustained in that accident; that she was required to prove affirmatively, by the preponderance of the evidence, "that she was a passenger upon a motorcycle, operated by her husband on Schreiber Road, in the city of Maple Heights, Ohio, on or about September 20, 1951, and that such motorcycle was involved in an accident by striking a hole in said street, and she must further prove that she was injured in said accident and, if so, the extent of such injury; and that such injuries, if any, were the direct and proximate result of such accident."

The jury returned a verdict for the plaintiff in the amount of $12,000.

An appeal was perfected to the Court of Appeals, which affirmed the judgment.

The cause is in this Court upon the allowance of a motion to certify the record.

Mr. Owen Calvin Neff, for appellee.

Mr. Elmer R. Vanek and *Mr. Austin T. Klein*, for appellant.

HERBERT, *J.* The eighth error assigned by the defendant is that "the trial and appellate courts committed error in permitting plaintiff to split her cause of action and to file a separate action in the Cleveland Municipal Court for her property damage and reduce same to judgment, and, thereafter, to proceed, in the Cuyahoga County Common Pleas Court, with a separate action for personal injuries, both claims arising out of a single accident."

Other facets of this question have been before the court before.

In the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, 61 N. E. (2d), 707, 166 A. L. R., 855, plaintiff operating an automobile came into collision with defendant's truck, in which collision he suffered personal injuries and also damage to his automobile. At the time of collision, plaintiff had coverage of a $50 deductible collision policy on his automobile. The insurance company paid the plaintiff a sum covering the damage to his automobile, whereupon, in accordance with a provision of the policy, the plaintiff assigned to the insurer his claim for such damage.

In February 1942, the insurance company commenced an action in the Common Pleas Court of Mahoning County against Kohlers, Inc., the defendant in the reported case, to recoup the money paid by it to cover the damage to Vasu's automobile.

In August 1942, Vasu commenced an action in the same court against Kohlers, Inc., to recover for personal injuries which he suffered in the same collision.

In March 1943, in the insurance company's action, a verdict was rendered in favor of the defendant, followed by judgment.

Two months later an amended answer was filed in the *Vasu* case, setting out as a bar to the action for recovery of damages for the personal injuries suffered by plaintiff the judgment rendered in favor of defendant in the insurance company case. A motion to strike that defense having been sustained, a second amended answer was filed omitting allegations as to such judgment. A trial of the action resulted in a verdict for plaintiff, upon which judgment was entered.

On appeal to the Court of Appeals the defendant claimed that the Court of Common Pleas erred in sustaining plaintiff's motion to strike from the defendant's answer the defense of *res judicata* claimed to have arisen by reason of the judgment in favor of the defendant in the action by the insurance company.

The Court of Appeals reversed the judgment of the Court of Common Pleas and entered final judgment in favor of defendant.

This Court reversed the judgment of the Court of Appeals, holding in the syllabus, in part, as follows:

> "1. If the owner of a single cause of action arising out of a single tortious act brings an action against his tort-feasor, he may have but one recovery; and, in case he fails to recover, he may not maintain a subsequent action on the same cause of action, even though he has failed to include his entire cause of action or elements of damage in his original action.
>
> "2. If an owner of a single cause of action has a recovery thereon, the cause of action is merged in the judgment; but if he fails to recover on his claimed cause of action and judgment goes against him, such judgment is *res judicata* and a bar to a second action on the same cause of action.
>
> "* * *
>
> "4. Injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action, with the result that the recovery or denial of recovery of compensation for damages to the property is no bar to an action subsequently prosecuted for the personal injury, unless by an adverse judgment in the first action issues are determined against the plaintiff which operate as an estoppel against him in the second action.

"5. A right, question or fact in issue which was necessarily determined by a court of competent jurisdiction in a judgment which has become final, cannot be disputed or litigated in a subsequent suit between the same parties, although the subsequent suit is based upon a different cause of action.

"6. Where an injury to person and to property through a single wrongful act causes a prior contract of indemnity and subrogation as to the injury to property, to come into operation for the benefit of the person injured, the indemnitor may prosecute a separate action against the party causing such injury for reimbursement for indemnity moneys paid under such contract.

"7. Parties in privy, in the sense that they are bound by a judgment, are those who acquired an interest in the subject matter after the beginning of the action or the rendition of the judgment; and if their title or interest attached before that fact, they are not bound unless made parties.

"8. A grantor or assignor is not bound, as to third persons, by any judgment which such third persons may obtain against his grantee or assignee adjudicating the title to or claim for the interest transferred, unless he participated in the action in such manner as to become, in effect, a party."

The foregoing syllabus is set forth at considerable length for subsequent reference herein. The first two paragraphs, although not pertinent there because of the fourth paragraph, are not only applicable but persuasive in our determination here. The sixth, seventh and eighth paragraphs deal with the factual situation which existed in the *Vasu* case, i.e., a prior contract of indemnity and subrogation. Although, as discussed *infra*, it was not actually necessary to the determination of the issue in that case, attention centers on the fourth paragraph.

The *Vasu* case was distinguished in the case of *Markota v. East Ohio Gas Co.*, 154 Ohio St., 546, 97 N. E. (2d), 13; and explained in the case of *Mansker v. Dealers Transport Co.*, 160 Ohio St., 255; 116 N. E. (2d), 3. In the *Markota* case, plaintiffs commenced an action for damages alleged to have been caused by the defendant in constructing and installing a pipeline over the plaintiffs' premises. Plaintiffs and defendant had entered into a right of way agreement giving the defendant the right to lay, maintain and operate the pipeline, the defendant agreeing to reimburse, indemnify and save plaintiffs harmless from and against any loss, damage or expense in connection therewith.

Plaintiffs' amended petition had seven causes of action, each for damages resulting from injuries to plaintiffs' property. Judgment was entered on the verdicts. The trial court granted a new trial on two causes of action, reducing the judgment by the amounts claimed in such causes of action. The question presented to this Court was whether "the trial court erred in failing to grant a new trial *in toto*." This Court reversed the judgment of the Court of Appeals which had affirmed the judgment of the Court of Common Pleas.

The pertinent portion of the syllabus in that case, decided by a unanimous court, is paragraph three:

> "Although a right of action may arise at each time that damage covered by a single indemnity agreement occurs, a plaintiff may maintain only one action to enforce any such rights existing at the time such action is commenced. (*Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, distinguished.)"

The opinion in the *Markota* case states (page 551):

> "However, paragraphs four and six of the syllabus in *Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, 61 N. E.

(2d), 707, do tend to support the defendant's contention that the separate causes of action, stated in the second amended petition in the instant case, were actually separate causes of action. It should be noted, however, that the plaintiff, in the *Vasu* case, had not been a party to the action brought by his indemnitor against the defendant; and, as indicated by paragraph eight of the syllabus in the *Vasu* case, the plaintiff was not, therefore, bound by the judgment against his indemnitor who had sought to recover from that defendant the portion of the plaintiff's claim assigned to such indemnitor."

The facts in the *Mansker* case are the converse of those in the instant case. In that case, Mansker commenced an action for personal injuries sustained by him in a collision of two motor vehicles and recovered a verdict and judgment, prevailing over the claim that he was estopped from prosecuting his action for the reason that the controlling issue of negligence therein had been fully litigated in a prior action between the same parties and had been determined by verdict and judgment adverse to him. Cf. paragraph five of the syllabus in the *Vasu* case, *supra*.

Two separate actions involving the same collision had previously been commenced against Mansker and his employer, Summit Fast Freight, Inc., one by Dealers Transport Company and the other by its driver, Dow, Dealers' action being for property damage and Dow's for personal injuries. In the action initiated by Dealers, in addition to a cross-petition filed by Summit for damages to its fire truck, a cross-petition was filed by Mansker to recover for damage to his tractor, due to the collision. The two previous cases were tried together by agreement and resulted in verdicts in favor of Dealers and Dow, respec-

tively, which verdicts, after remittiturs were ordered and accepted, were reduced to judgments, and the judgments subsequently paid.

In the *Mansker* case (160 Ohio St., 255) the issue of *res judicata* was raised. This Court reversed the judgment of the Court of Appeals which had affirmed the judgment of the Court of Common Pleas, and entered judgment for Dealers.

As stated in the opinion, both lower courts relied on the fourth paragraph of the syllabus of the *Vasu* case and reached the conclusion that "such case is authority for the proposition that where the same person sustains injury to both his property and his person as a result of the same incident and due to the claimed negligence of another, an infringement of different rights occurs, so that he has two causes of action—one for damage to his property and the other for injury to his person; that, hence, where he prosecutes those causes of action separately, a verdict and judgment against him in one case do not preclude him from litigating the other, and his success in the other case is not prevented by an adverse result in the first, and that in such a situation *res judicata* or estoppel may not be invoked by his opponent."

The syllabus states:

> "1. In a second action between the same parties on a claim, demand or cause of action different from that involved in the first action, a final judgment in the first action does not constitute a bar to the prosecution of the second, but does operate as an estoppel with regard to the relitigation of controlling points or questions actually determined in the first action. (Paragraph four of the syllabus of *Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, explained.)

"2. The final adjudication of a material issue by a court of competent jurisdiction binds the parties in any subsequent proceeding between or among them, irrespective of a difference in forms or causes of action."

Thus, the *Markota* and *Mansker* cases, distinguishing and explaining the *Vasu* case, have not changed the rule established in paragraph four of the syllabus of the latter case, holding that injuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action.

However, it is contended here that that rule is in conflict with the great weight of authority in this country and has caused vexatious litigation. The following quotation from 1 *American Jurisprudence,* 494, Section 114, states this question well:

"It sometimes happens that a single wrongful or negligent act causes damage in respect of both the person and the property of the same individual, as, for instance, where the owner of a vehicle is injured in a collision which also damages the vehicle. In such a case, the question arises as to whether there are two causes of action or only one, and the authorities are in conflict concerning it. The majority rule is that only one cause of action arises, the reason of the rule being that as the defendant's wrongful act is single, the cause of action must be single, and that the different injuries occasioned by it are merely items of damage proceeding from the same wrong. * * *

"In other jurisdictions, the rule is that two causes of action result from a negligent act which inflicts injury on a person and his property at the same time. This conclusion has been reached in different jurisdictions by different lines of reasoning."

Upon examination of decisions of courts of last resort, we [sic] each of which the action was between the person suffering find that the majority rule is followed in the following cases in injury and the person committing the tort, and where insurers were not involved, as in the case here.

Birmingham Southern Ry. Co. v. Lintner (1904), 141 Ala., 420, 38 So., 363, 109 Am. St. Rep., 40; *Jenkins v. Skelton* (1920), 21 Ariz., 663, 192 P., 249; *Gregory v. Schnurstein* (1956), 212 Ga., 497, 93 S. E. (2d), 680; *Georgia Ry. & Power Co. v. Endsley* (1928), 167 Ga., 439, 145 S. E., 851, 62 A. L. R., 256; *Fiscus v. Kansas City Public Service Co.* (1941), 153 Kan., 493, 112 P. (2d), 83; *Cassidy v. Berkovitz* (1916), 169 Ky., 785, 185 S. W., 129; *Pillsbury v. Kesslen Shoe Co.* (1939), 136 Me., 235, 7 A. (2d), 898; *Doran v. Cohen* (1888), 147 Mass., 342, 17 N. E., 647; *Dearden v. Hey* (1939), 304 Mass., 659, 24 N. E. (2d), 644, 127 A. L. R., 1077; *Tuttle v. Evershot Heater Co.* (1933), 264 Mich., 60, 249 N. W., 467; *King v. Chicago, Milwaukee & St. Paul Ry Co.* (1900), 80 Minn., 83, 82 N. W., 1113, 81 Am. St. Rep., 238, 50 L. R. A., 161; *Kimball v. Louisville & Nashville Rd. Co.* (1909), 94 Miss., 396, 48 So., 230; *Chamberlain v. Mo.-Ark. Coach Lines, Inc.* (1945), 354 Mo., 461, 189 S. W. (2d), 538, 161 A. L. R., 204; *Underwood v. Dooley* (1929), 197 N. C., 100, 147 S. E., 686, 64 A. L. R., 656; *Anderson v. Jacobson* (1919), 42 N. D., 87, 172 N. W., 64; *Fields v. Philadelphia Rapid Transit Co.* (1922), 273 Pa., 282, 117 A., 59; *Farmers Ins. Exchange v. Arlt* (N. D., 1953), 61 N. W. (2d), 429; *Holcombe v. Garland & Denwiddie, Inc.* (1931), 162 S. C., 379, 160 S. E., 881; *Mobile & Ohio Rd. Co. v. Matthews* (1906), 115 Tenn., 172, 91 S. W., 194; *Smith v. Lenzi* (1929), 74 Utah, 362, 279 P., 893; *Moultroup, Admx., v.*

Gorham (1943), 113 Vt., 317, 34 A. (2d), 96; *Sprague v. Adams* (1926), 139 Wash., 510, 247 P., 960, 47 A. L. R., 529; *Lazro v. Swift & Co.* (1946), 129 W. Va., 436, 40 S. E. (2d), 811.

The minority rule, that separate actions may be maintained to recover for personal injuries and for damages to property resulting from the same wrongful act, is set forth in the following cases:

Thelin v. Stewart (1893), 100 Cal., 372, 34 P., 861; *Lamb v. Harbaugh* (1895), 105 Cal., 680, 39 P., 56; *Ochs v. Public Service Ry. Co.* (1911), 81 N. J. L., 661, 80 A., 495, 36 L. R. A. (N. S.), 240, Ann. Cas. 1912D, 255; *Reilly v. Sicilian Asphalt Paving Co.* (1902), 170 N. Y., 40, 62 N. E., 772, 88 Am. St. Rep., 636, 57 L. R. A., 176; *Watson v. Texas & Pacific Ry. Co.* (1894), 8 Tex. Cir. App., 144, 27 S. W., 924; *Carter v. Hinkle* (1949), 189 Va., 1, 52 S. E. (2d), 135.

As to the rule in New York, however, it is noted in the opinion in the *Vasu* case (page 331) that "the court, in deciding the *Reilly* case, took a position contra to an earlier holding in the same state in the case of *Howe v. Peckham* (N. Y. Supreme Court), 6 How. Pr., 229, 10 Barb., 656, a case frequently cited (see quotation from Phillips' Pleading, *infra*) as supporting the single-cause-of-action rule."

The reasoning behind the majority rule seems to be well stated in the case of *Mobile & Ohio Rd. Co. v. Matthews*, *supra*, as follows:

> "The negligent action of the plaintiff in error constituted but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to

the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense, and delays to plaintiffs, and vexatious litigation against defendants. * * *

"Indeed, if the plaintiff fail to sue for the entire damage done him by the tort, a second action for the damages omitted will be precluded by the judgment in the first suit brought and tried."

The minority rule would seem to stem from the English case of *Brunsden v. Humphrey* (1884), 14 Q. B., 141. The facts in that case are set forth in the opinion in the *Vasu* case (page 329), concluding with the statement:

"The Master of the Rolls, in his opinion, stated that the test is 'whether the same sort of evidence would prove the plaintiff's case in the two actions,' and that, in the action relating to the cab, 'it would be necessary to give evidence of the damage done to the plaintiff's vehicle. In the present action it would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he has undergone, and for this purpose to call medical witnesses. This one test shows that the causes of action as to the damage done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person, are distinct.'"

The fallacy of the reasoning in the English court is best portrayed in the dissenting opinion of Lord Coleridge, as follows:

"It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same: that the in-

> jury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different *rights*, i.e. his person and his goods. I do not in the least deny; but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions, if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg injured, his trousers which contain his leg, and his coat-sleeve which contains his arm, have been torn."

There appears to be no valid reason in these days of code pleading to adhere to the old English rule as to distinctions between injuries to the person and damages to the person's property resulting from a single tort. It would seem that the minority rule is bottomed on the proposition that the right of bodily security is fundamentally different from the right of security of property and, also, that, in actions predicated upon a negligent act, damages are a necessary element of each independent cause of action and no recovery may be had unless and until actual consequential damages are shown.

Whether or not injuries to both person and property resulting from the same wrongful act are to be treated as injuries to separate rights or as separate items of damage, paragraph three of the syllabus in the *Markota* case gives us the answer that a plaintiff may maintain only one action to enforce his rights existing at the time such action is commenced.

The decision of the question actually in issue in the *Vasu* case is found in paragraphs six, seven and eight of the syllabus, as it is quite apparent from the facts there that the first judgment, claimed to be *res judicata* in Vasu's action against the defendant, was rendered against Vasu's insurer in an action initiated by it after having paid Vasu

for the damages to his automobile. That case is considered and discussed at length in 166 A. L. R., 870.

Upon further examination of the cases from other jurisdictions, it appears that in those instances where the courts have held to the majority rule, a separation of causes of action is almost universally recognized where an insurer has acquired by an assignment or by subrogation the right to recover from money it has advanced to pay for property damage.

In some instances those jurisdictions recognize the right of the insurer to become a party to the action and recover in the single action that part of the damages to which it has become subrogated. See *Moultroup, Admx., v. Gorham, supra*; *Farmer v. Union Ins. Co. of Indiana* (1927), 146 Miss., 600, 111 So., 584; *Sprague v. Adams, supra.*

In other states, and particularly in those having statutes requiring actions to be brought by the real party in interest, the courts have recognized the right of the insurer to bring a separate action to recover in its own name for that part of a single cause of action to which it has become entitled by payment of damages. The following cases are illustrative:

Travelers Indemnity Co. v. Moore (1947), 304 Ky., 456, 201 S. W. (2d), 7; *Underwriters at Lloyds Ins. Co. v. Vicksburg Traction Co.* (1913), 106 Miss., 244, 63 So., 455; *General Exchange Ins. Corp. v. Young* (1948), 357 Mo., 1099, 212 S. W. (2d), 396; *Underwood v. Dooley, supra; Farmers Ins. Exchange v. Arlt, supra; Tobin, Admr., v. Glerich* (1931), 162 Tenn., 96, 34 S. W. (2d), 1058.

Section 2307.05, Revised Code, requires actions to be prosecuted in the name of the real party in interest, as was done by Vasu's insurer.

The reason why the exception is recognized that, where the plaintiff has recovered from an insurance company a part of his damage, he is not estopped from prosecuting his own action, is well stated in the North Carolina case of *Underwood v. Dooley, supra*, as follows:

> "It cannot be held as law in this state that the owner of an automobile, who, as the result of the wrong or tort of another, has sustained damages both to his automobile and to his person, and whose automobile is insured against the loss or damage which he has sustained because of injuries to his automobile, is put to an election whether or not he shall, in order to maintain an action against the wrongdoer to recover damages for injuries to his person, release the insurance company from all liability to him under its policy. He does not lose his right of action to recover for the injuries to his person, by accepting from the insurance company the amount for which it is liable to him * * *."

Coming again to the defendant's eighth assignment of error, it is noted that the rule attributed to the Ohio courts, as it is stated in 1 Ohio Jurisprudence (2d), 360, is based primarily on the *Vasu* case, although prior lower court decisions reaching a different conclusion are cited and recognized therein with the statement that "these cases are impliedly overruled."

Apparently, much of the vexatious litigation, with its attendant confusion, which has resulted in recent years from the filing of separate petitions by the same plaintiff, one for personal injuries and one for property damage although sustained simultaneously, has grown from that one decision, this case presenting a good example.

In the light of the foregoing, it is the view of this court that the so-called majority rule conforms much more

properly to modern practice, and that the rule declared in the fourth paragraph of the syllabus in the *Vasu* case, on a point not actually at issue therein, should not be followed.

We, therefore, conclude and hold that where a person suffers both personal injuries and property damages as a result of the same wrongful act, only a single cause of action arises, the different injuries occasioned thereby being separate items of damage from such act. It follows that paragraph four of the syllabus in the *Vasu* case must be overruled.

It is not necessary in view of this conclusion to consider the other errors assigned herein.

Accordingly, the judgment of the Court of Appeals is reversed, and final judgment is entered for defendant.

Judgment reversed and final judgment for defendant.

WEYGANDT, C. J., STEWART, TAFT, MATTHIAS and BELL, JJ., concur.

ZIMMERMAN, J., dissents.

STEWART, J., concurring. In the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, 327, 61 N. E. (2d), 707, 166 A. L. R., 855, Judge Hart stated in part:

> "The rule at common law and in a majority of the states of the union is that damages resulting from a single wrongful act, even though they include both property and personal injury damages, are, when suffered by the same person, the subject of only one action against the wrongdoer."

However, he referred to the fact that there were a number of state jurisdictions which followed the English rule, laid down in *Brunsden v. Humphrey*, L. R., 14, Q. B.

Div., 141, and known as the two-causes-of-action rule, and then proceeded to announce that rule as the Ohio rule, and it was written into the fourth paragraph of the syllabus of the *Vasu* case. If it had been necessary to decide the question whether a single tort gives rise to two causes of action as to the one injured by such tort, I would be reluctant to disturb that holding. However, neither the discussion in the *Vasu* case as to whether a single or double cause of action arises from one tort nor the language of the fourth paragraph of the syllabus was necessary to decide the issue presented in the case, and obviously both such language and such paragraph are obiter dicta and, therefore, are not as persuasive an authority as if they had been appropriate to the question presented.

As to the case of *Brunsden v. Humphrey, supra*, which is the basis for the minority rule in this country, it seems to me that the dissenting opinion of Lord Coleridge, as quoted in the majority opinion in the present case, is not only highly persuasive but logically unanswerable, and that this court is justified in departing from the obiter dicta of the *Vasu* case.

ZIMMERMAN, J., dissenting. I am not unalterably opposed to upsetting prior decisions of this court where changing conditions and the lessons of experience clearly indicate the desirability of such course, but, where those considerations do not obtain, established law should remain undisturbed in order to insure a stability on which the lower courts and the legal profession generally may rely with some degree of confidence.

Much may be said in support of the position taken in the majority opinion herein. However, there is a sharp

division in the cases as to whether injuries to both person and property suffered by the same person as a result of the same wrongful act give rise to distinct causes of action or to a single cause of action. Less than 13 years ago that question was discussed at some length in the opinion in the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St., 321, 61 N. E. (2d), 707, 166 A. L. R., 855, and the rule in favor of distinct causes of action was carried into the fourth paragraph of the syllabus and approved by a unanimous court.

As is pointed out in the majority opinion, neither of the later cases of *Markota v. East Ohio Gas Co.*, 154 Ohio St., 546, 97 N. E. (2d), 13, nor *Mansker v. Dealers Transport Co.*, 160 Ohio St., 255, 116 N. E. (2d), 3, reversed the law as set out in paragraph four of the syllabus of the *Vasu* case.

As to the conflict existing among the cases on the matter under discussion, attention is directed to 1 American Jurisprudence, 494, Section 114, and 1 Corpus Juris Secundum, 1334, Actions, Section 104.

In the latter volume, at pages 1334 and 1335, the following succinct and accurate statement appears:

> "The question of whether a single tortious act which causes injury to the person and property of plaintiff gives rise to a single cause of action or to two separate causes is one on which there is a sharp conflict of authority * * *. In some jurisdictions an injury to person and to property, although resulting from the same tortious act, constitutes different causes of action. In other jurisdictions the fact that the injuries sustained are diversified in character does not cause two or more causes of action to accrue from a single tort, and a single tort which causes injury both to the person and property of an indivdual gives rise to but one cause of action * * *."

There is abundant and respectable authority for both of the above viewpoints. Ohio has deliberately adopted one of them, and I can find no impelling reason for changing the rule at the present time.

In the recent case of *Reid v. Holden*, 242 N. C., 408, 88 S. E. (2d), 125, the Supreme Court of North Carolina held that, although a cause of action for personal injury is separate and distinct from a cause of action for tortious damage to personal property, they may be united in the same complaint if the plaintiff so elects. Of course, that would also be true in Ohio.

ORDER OF THE SUPREME COURT OF OHIO DENYING APPLICATION FOR REHEARING.

(Entered February 26, 1958.)

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
AUG
JAMES

In the Supreme Court of the United States

No. 69.
OCTOBER TERM, 1958.

LENORE RUSH,
Petitioner,

vs.

THE CITY OF MAPLE HEIGHTS,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

ARTHUR KRAUSE,
426 Engineers Bldg.,
Cleveland, Ohio,
Attorney for Respondent.

AUSTIN T. KLEIN,
ELMER R. VANEK,
Of Counsel.

TABLE OF CONTENTS.

Questions Presented 1

Reasons for Denying the Writ of Certiorari 2

I. Jurisdiction 2

II. Action of the Ohio Supreme Court 3

III. Procedural Due Process 7

Conclusion 9

TABLE OF AUTHORITIES.

Cases.

Bothwell v. Buckbee-Mears Co., 275 U. S. 274 3

Central Vermont Railway Co. v. White, 238 U. S. 507 7

Cleveland Railway Co. v. Cleveland, Ohio, 235 U. S. 50 2

Durham v. United States, 214 F. 2d 862 8

Great Northern Railway Co. v. Sunburst Oil and Refining Co., 287 U. S. 358 8

Hanks v. McDanell, 307 Ky. 243, 210 S. W. 2d 784 7

Kabatchnik v. Hanover-Elm Building Corp., 328 Mass. 341, 103 N. E. 2d 692 7

Mansker v. Dealers Transport Co., 160 Ohio St. 255 ..... 5, 6

Markota v. East Ohio Gas Co., 154 Ohio St. 546 ..... 5, 6

Otter Tail Power Co. v. Von Bank, 72 N. D. 497, 8 N. W. 2d 599 7

People of the State of New York ex rel. Consolidated Water Co. of Utica v. Maltbie, 303 U. S. 158 2-3

Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U. S. 206 2

U. S. Fidelity and Guaranty Co. v. State of Oklahoma, 250 U. S. 111 3

Vasu v. Kohlers, Inc., 145 Ohio St. 321 4

Statute.

28 U. S. C. 1257 (3) 1, 2, 9

In the Supreme Court of the United States

No. 69.
OCTOBER TERM, 1958.

LENORE RUSH,
Petitioner,
vs.
THE CITY OF MAPLE HEIGHTS,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent, The City of Maple Heights, respectfully requests this Honorable Court to deny a writ of certiorari to review an order and judgment of the Supreme Court of Ohio, rendered in this cause on the 26th day of February, 1958.

QUESTIONS PRESENTED.

1. Whether the record of the present case is sufficient to confer jurisdiction upon the United States Supreme Court under the provisions of Title 28 U. S. C. § 1257(3).

2. Whether the Ohio Supreme Court expressly reversed prior decisions of that court or whether it merely clarified the law as it already existed.

3. Whether petitioner was denied procedural due process by the decision of the Ohio Supreme Court in the present case.

REASONS FOR DENYING THE WRIT OF CERTIORARI.

I. Jurisdiction.

Petitioner contends that jurisdiction in the instant case is conferred upon the Supreme Court of the United States by virtue of the provisions of Title 28, Section 1257(3) of the United States Code.

Title 28 U. S. C. § 1257(3) provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

In order to bring a case before the United States Supreme Court under this section it is well settled that the Federal right claimed to have been violated must have been set up and adjudicated against the claimant by the judgment of the State court, *Cleveland Railway Co. v. Cleveland, Ohio*, 235 U. S. 50. The Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the Federal question was necessary to a determination of the cause, that the Federal question was actually decided, or that the judgment as rendered could not have been given without deciding it. *Southwestern Bell Telephone Co. v. State of Oklahoma*, 303 U. S. 206; *People of the State of*

New York ex rel. Consolidated Water Co. of Utica v. Maltbie, 303 U. S. 158.

Thus, the mere assertion by the Petitioner that a Constitutional right has been violated is not sufficient to give the United States Supreme Court jurisdiction to review a decision of a state Supreme Court. There must be a real and substantial controversy of the required character which deserves serious attention. *U. S. Fidelity and Guaranty Co. v. State of Oklahoma*, 250 U. S. 111. In the case of *Bothwell v. Buckbee-Mears Co.*, 275 U. S. 274, it was held that a claim not asserted in the state courts will not be considered on certiorari to the United States Supreme Court.

In the instant case no Federal question was raised at any stage of the proceedings in the courts of the State of Ohio. Nor was it necessary for the state courts to rule on any Federal questions in this case, none being involved from the facts or the decisions rendered. Since the United States Supreme Court will not undertake to review what the courts below did not decide, the Petition for a Writ of Certiorari should be denied.

II. Action of the Ohio Supreme Court.

The decision of the Ohio Supreme Court in the instant case did not overrule any previous decisions of that Court so as to deny the Petitioner a cause of action.

Prior to 1945, the common law in Ohio was that upon the happening of an accident followed by personal injury and property damage there was only one cause of action, and, if a plaintiff split this cause of action and sued separately for either personal injury or property damage, a judgment upon the first filed and tried case, whether for or against the plaintiff, became a bar against a subsequent

suit for damages brought by the same plaintiff for the other damages allegedly sustained. Then, in 1945, the Ohio Supreme Court decided the case of *Vasu v. Kohlers, Inc.*, 145 Ohio St. 321. In that case the plaintiff was involved in an automobile accident and assigned his entire claim for property damage to an insurance carrier with whom he had a $50 deductible policy of collision insurance. The insurance carrier brought an action as subrogee of the plaintiff's cause of action for property damage. The Ohio Supreme Court held that an insurance carrier which has paid a property damage claim for injury to its assured's automobile may, as subrogee, maintain an action for reimbursement against the party who wrongfully caused the damage, independent of any claim of the owner for personal injuries growing out of the same accident. The Court further held that such act and procedure do not constitute the splitting of a cause of action.

In the *Vasu v. Kohler* case for personal injuries the Ohio Supreme Court held that the judgment in the property damage case in which the plaintiff, Vasu, had not been a party, was not a bar because the plaintiff therein was not a party to the first suit for property damage and, moreover, an Ohio statute specifically permitted a splitting since the *statute* provided that a cause should be brought by the real party in interest. The Court held that the assignment of the property damage claim to the insurance company transferred the plaintiff's interest therein and thereafter plaintiff did not participate in the first action in such a manner as to become, in effect, a party. Thus, circuitously, the Ohio Supreme Court created an *exception* to the ban on splitting causes of action without changing the original law. There was however some verbiage therein which did say that damage to property gives rise to a separate cause of action from damage to the person.

After the Ohio Supreme Court decided the *Vasu* case, it soon discovered that the ruling had taken on greater meaning than it had originally intended. Thus, when the opportunity to distinguish the *Vasu* case presented itself, the Supreme Court quickly did so.

In the 3rd Syllabus of *Markota v. East Ohio Gas Company*, 154 Ohio St. 546, the Court stated:

> "Although a right of action may arise at each time that damage covered by a single indemnity agreement occurs, a plaintiff may maintain only one action to enforce any such rights existing at the time such action is commenced. (*Vasu v. Kohlers, Inc.*, 145 Ohio St. 321, 30 Ohio Opinions 542, distinguished.)"

In the body of the opinion the Court went on to say:

> "It should be noted, however, that the plaintiff, in the *Vasu* case, had not been a party to the action brought by his indemnitor against the defendant; and, as indicated by paragraph eight of the syllabus in the *Vasu* case, the plaintiff was not, therefore, bound by the judgment against his indemnitor who had sought to recover from that defendant the portion of the plaintiff's claim assigned to such indemnitor."

Perhaps it should be noted that in the indemnification agreement in the *Markota* case the elements of damage would have sounded in tort. Nevertheless, the Court implied that the rule that only one action can be maintained to enforce all elements of damage arising out of a single act would be the same even in the absence of an indemnity agreement.

Later, in the case of *Mansker v. Dealers Transport Company*, 160 Ohio St. 255, the Supreme Court again explained and restricted its holding in the *Vasu* case:

> "Actually, the fourth paragraph of the syllabus in the Vasu case means and was intended to mean that where a second action is instituted upon a claim, demand or cause of action *different* from that involved in the first action, the judgment in the first action is not a bar to the prosecution of the second, but operates only as an estoppel with regard to points in the first action."

In the *Mansker* case, the plaintiff first brought an action for property damage and, being unsuccessful in that action, sought to bring an action for personal injuries. Note that in these cases, the plaintiff and defendant were the same persons in both actions. Thus, in the time between the *Vasu* case and the instant case, the Supreme Court of Ohio was not presented with a situation in which a plaintiff split his cause of action for personal injuries and property damage, resulting from a single tortious act, and leading to a judgment in his favor. Nowhere in the reported decisions of the Supreme Court of Ohio since the *Vasu* case has there been any definitive statement that where personal injuries and property damage result from a single tortious act two causes of action arise which can be sued on separately by a single plaintiff. As a result of the *Markota* case, *supra*, the *Vasu* case (and its explanation in the *Mansker* case) must be confined to its facts, and Petitioner's contention that the Ohio Supreme Court overruled its previous decisions without notice is without merit, and no vested rights were taken from the Petitioner by the Court's holding in the instant case. Thus, there is no ground upon which Petitioner can predicate a Petition for a Writ of Certiorari.

Even if the Ohio Supreme Court's holding in the instant case is considered as overruling a previous decision, courts have the power to do so, for to make *stare decisis* always paramount would be to deprive the law of its

capacity for growth and adaptation. *Kabatchnik v. Hanover-Elm Building Corporation*, 328 Mass. 341, 103 N. E. 2d 692.

The doctrine of *stare decisis* is never mandatory, but at most possesses only persuasive effect, and the courts have the right and duty to remove from the body of the law such former obstructive opinions as are clearly erroneous, and confusing and conflicting, as well as contradictory of ancient and well settled rules. *Hanks v. McDanell*, 307 Ky. 243, 210 S. W. 2d 784. Whether or not a previous holding shall be adhered to or modified or overruled is a question within the discretion of the court under the circumstances of the case under consideration. *Otter Tail Power Company v. Von Bank*, 72 N. D. 497, 8 N. W. 2d 599.

Thus, whether the holding of the Ohio Supreme Court in the instant case is deemed to be an explanation and clarification of the law as it existed, or whether the holding is considered as overruling previous decisions, the Petition for a Writ of Certiorari should be denied, since the courts are empowered to follow either course of action.

In addition, matters affecting the remedy are governed by the law of the forum, and a decision of a state court on a matter of state pleading or practice is, therefore, not reviewable by the United States Supreme Court. *Central Vermont Railway Company v. White*, 238 U. S. 507.

III. Procedural Due Process.

The Ohio Supreme Court's holding in the instant case has not denied Petitioner procedural due process. Petitioner's claim here is without merit, for if the view that the holding in the instant case merely explained and clarified the law as it existed is taken, then, the matter of due process is not an issue and can be disregarded.

Moreover, if the view that the instant case overruled previous decisions is taken, Petitioner's claim is still without merit. There is no constitutional objection to a court's making a choice for itself in overruling an earlier decision, whether the new rule declared by it shall operate prospectively only or apply also to past transactions.

In Petitioner's Brief, on page 7, Petitioner contends that a *legislature* may not enact retroactive legislation. This contention is inapplicable here, for although it is well settled that under certain circumstances even a legislature may enact retroactive legislation, this principle is not applied to judicial decisions. In the leading case of *Great Northern Railway Company v. Sunburst Oil and Refining Company*, 287 U. S. 358, it was held that the highest court of a state in overruling an earlier decision may, consistently with the due process clause of the Fourteenth Amendment, make a choice for itself whether the new rule declared by it shall operate prospectively only, or apply also to past transactions, and the alternative is the same whether the subject of the new decision is common law or the construction of a statute.

In the *Great Northern* case, *supra*, Justice Cardozo said:

> "A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward."

In the case of *Durham v. United States*, 214 F. 2d 862, it was also held that decisions may be applied retroactively or prospectively.

Thus, it is clear that Petitioner was not denied procedural due process.

CONCLUSION.

Respondent contends that the record of the instant case is insufficient to confer jurisdiction upon the United States Supreme Court under the provisions of Title 28, Section 1257 (3) of the United States Code; that whether the Ohio Supreme Court expressly reversed prior decisions of that court or merely clarified the law as it already existed, it had a right to choose either course of action; and that the decision of the Ohio Supreme Court in the instant case did not deny Petitioner any rights secured by the Fourteenth Amendment.

Accordingly, this Honorable Court should deny the Petition for a writ of certiorari.

Respectfully submitted,

ARTHUR KRAUSE,
Attorney for Respondent.

AUSTIN T. KLEIN,
ELMER R. VANEK,
Of Counsel.